Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Forbearance From	)	
The Current Pricing Rules for	)	WC Docket No. 03-157
The Unbundled Network Element	)	
Platform	)	

OPPOSITION OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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I. INTRODUCTION AND SUMMARY.

The Competitive Telecommunications Association ("CompTel") submits these comments in opposition to Verizon Communications' ("Verizon") self-styled "Petition for Forbearance" ("Petition") filed with the Commission on July 1, 2003. Verizon's Petition not only fails to satisfy the elements of a Section 10 forbearance petition, but the Petition itself is not at all a good faith request for the Commission to refrain from requiring it to comply with a regulation. Rather, Verizon simply repeats arguments (unsupported by anything more than its own extrapolations based on the casual empiricism of others), which have been previously considered and rejected by the Commission. Once again, Verizon argues that UNE-P should not be required to be available at all, that UNE-P should not be priced at TELRIC rates, and that the Commission should allow Verizon to provide exchange access services over UNEs leased by another carrier. Clearly, the relief requested by Verizon is affirmative relief more appropriate to a request for a public notice and comment rulemaking than a Petition for Forbearance.

Accordingly, CompTel has previously urged the Commission, in this very docket, to dismiss and deny Verizon's Petition in favor of undertaking a comprehensive review through a notice and comment rulemaking of the Commission's existing guidance concerning application of its TELRIC rules with respect to *all* unbundled network elements ("UNEs") under the Act.[1] Such an outcome is fully consistent with Commission precedent when the subject of a forbearance petition is properly considered within the context of a more comprehensive rulemaking proceeding.[2]

II. VERIZON DOES NOT SEEK MERE FORBEARANCE, BUT RATHER A RULE CHANGE.

In the instant Petition, Verizon acknowledges that the Commission "has indicated that it intends to initiate a proceeding to reform its current TELRIC pricing rules."[3] Verizon encourages the Commission "to do so expeditiously" and to conclude the rulemaking by granting the ultimate relief Verizon seeks—changes in the current TELRIC standard. Verizon concludes its introductory paragraph by candidly admitting that what it truly seeks are interim rule modifications that will "ameliorate the most harmful effects of [the current TELRIC rules]."[4]

Similarly, a significant part of Verizon's Petition is spent explaining that the Commission has "ample authority,"[5] "discretion,"[6] and "ample discretion"[7] to adopt Verizon's requests that UNE-P should be priced as resale and that Verizon be allowed to

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1 *See* Letter from H. Russell Frisby, Jr., CompTel, to Chairman Michael K. Powell, FCC, dated August 8, 2003, WC Docket No. 03-157.

2 *See, e.g., In the Matter of New England Telephone and Telegraph Company and New York Telephone Company Petition for Forbearance From Jurisdictional Separations Rules*, 12 FCC Rcd 2308 (rel. Feb. 20, 1997) ("*NYNEX Order*").

3 Petition at 1.

4 *Id.*

5 *Id*. at 12, 14.

6 *Id.* at 12, 13, 17.

7 *Id.* at 18.

collect for exchange access services provided over UNEs leased by another carrier. While it is unclear whether the Commission has the legal discretion to adopt Verizon's *proposed rules*, the Commission's authority to adopt *different rules* than those currently in place is self-evident from the fact that each of Verizon's current arguments has been considered and rejected by the Commission in a prior *rulemaking* proceeding.[8] Similarly, the Commission's "authority" to reject Verizon's arguments in favor of the existing rules in each case has been upheld on appeal. There is no question that the Commission has the authority to adopt different rules implementing the Act. Nonetheless, the fact remains that the relief requested by Verizon requires an *affirmative rule change* and not mere forbearance from enforcing an existing rule.

The Commission addressed a nearly identical "forbearance" petition from Verizon's predecessor-in-interest, NYNEX, shortly after the Act was passed and the forbearance provisions of Section 10 became available. In that petition, NYNEX asked the Commission to "forbear" from applying its existing separations rules, and, instead, adopt a single, fixed factor for each ILEC study area to apportion joint and common costs between their interstate and intrastate operations.[9] The Commission denied NYNEX's request for "forbearance," explaining that

> NYNEX did not ask us merely to refrain from applying the current

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[8] While it is clear that the Commission has the discretion to reject Verizon's requests, it is doubtful that the Commission could legally impose the resale rate on any UNE combination. State Commissions are forbidden under Section 252(d)(1)(A) from setting UNE rates based on rates set under rate-of-return regulation, which is the case for most state retail rates. It is similarly doubtful that the Commission could satisfy the "nondiscriminatory" requirement of Section 251(c) if it were to require a certain subset of competitors (*i.e.,* UNE-P providers) to pay the cost of the UNE, but forbid them the same use of the UNE enjoyed by the ILEC or other competitors (*i.e.,* UNE-L providers).

[9] *NYNEX Order* at 2308 (¶ 1).

> separations rules. Instead, it proposed use of the Commission's forbearance authority as a means of replacing those rules with new ones without the notice and comment required by the Administrative Procedure Act . . . .[10]

Now, as then, "the relief requested by [Verizon] goes beyond mere forbearance from regulation and instead requests that we substantially amend our [existing] rules."[11] Accordingly, the Commission would be well advised to follow its precedent and dismiss and deny Verizon's Petition, while committing to address Verizon's concerns in a subsequent public notice and comment rulemaking where the Commission can legally consider Verizon's requests for rule changes.

III. VERIZON'S ARGUMENTS IN SUPPORT OF ITS PETITION HAVE BEEN PREVIOUSLY CONSIDERED AND REJECTED BY THE COMMISSION.

As noted above, the "most harmful effects" of the TELRIC rules, which Verizon claims precipitated the instant Petition, were previously asserted by Verizon, considered by the Commission, and rejected by the Commission in the first *Local Competition Order*. Once again, Verizon explains that it doesn't like the TELRIC methodology because it results in rates that are too low for Verizon to recover its "investment" or "costs" (neither of which Verizon attempts to define).[12] Verizon also asserts that the TELRIC methodology (when applied to the UNE Platform) has caused competitive carriers using other entry strategies to abandon their own facilities in favor of using the

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10 *NYNEX Order* at 2314 (¶ 13).

11 *Id.* at 2313 (¶ 12).

12 Petition at 1-6. CompTel, of course, disputes this assertion and has demonstrated that, contrary to some of the analyst statements Verizon quotes in its Petition, a careful analysis reveals that Verizon is actually earning (based on its 1st quarter 2003 numbers) a profit of approximately $150 million per year from wholesale UNE-P. *See* Wholesale Lies: The Truth About RBOC UNE-P Costs, pp. 6-7, released May 22, 2003. Available at http://www.comptel.org/newsfr.html

TELRIC-priced UNE Platform.[13] Further, Verizon again contends that these negative consequences of TELRIC are exacerbated by the Commission's current restriction that prevents Verizon from providing exchange access services over UNEs leased by another carrier.[14]

In this respect, Verizon's Petition essentially repeats the same fundamental arguments that it made, and the Commission rejected, in the first Local Competition Order.[15] Moreover, Verizon concedes, as it must, that the Supreme Court found both the UNE Platform rules and the TELRIC methodology to be reasonable interpretations of the Act.[16] Similarly, the Commission declined to adopt most of the changes Verizon seeks (eliminating UNE-P, or pricing it at resale rates, and preventing UNE-P-based carriers

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13 *See* Petition at 6-11.

14 *See id.* at 4-5.

15 *See, e.g.*, First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") ¶ 638 ("incumbent LECs argue that setting prices based on the forward-looking economic cost of the element will not create incentives for new entrants to build their own facilities, and will discourage efficient entry and useful investment by both incumbent LECs and their competitors."). *But see, id.* at ¶ 685 ("this approach [TELRIC] encourages facilities-based competition to the extent that new entrants, by designing more efficient network configurations, are able to provide the service at a lower cost than the incumbent LEC."). *See also, id.* at ¶ 722 (while allowing for a temporary continuation of certain access charges, the Commission notes, "we do not permit incumbent LECs to assess on purchasers of the unbundled local switching element any interstate access charges [other than those temporarily allowed by the Commission]." Further, "[i]mposition of these facility-based access charges in addition to the cost-based charges for comparable network elements established under Section 252 could result in double recovery."). Verizon feebly tries to distinguish its present request by arguing that it is not seeking to have competitors pay exchange access charges, which the Commission rejected in the *Local Competition Order*. Rather, Verizon simply wants the exclusive right to continue to collect access from IXCs. *See* Petition at 17-18, n. 37. This is a distinction without a difference. It is immaterial whether the competitor pays Verizon and bills the IXC, or simply allows Verizon to continue to bill the IXC directly, the end result is the same: a competitor pays the full costs of the UNE but does not get nondiscriminatory access to the UNE, because the competitor gets a UNE that is less capable of providing all telecommunications services.

16 Petition at 12-13.

from providing exchange access) in the intervening *UNE Remand Order* and (based on all available information) in the *Triennial Review Order*. Verizon makes no new arguments and introduces no facts at all. The only information Verizon seeks to proffer in lieu of evidence is a compilation of sympathetic third-party hearsay from sources that notably lack the same access to Verizon's cost and investment data that Verizon itself enjoys. Further, Verizon expects the Commission to credulously accept conclusory interpretations of coincident events based on its own casual empiricism instead of facts.[17] Thus, with no evidence and "rais[ing] no arguments not already considered and rejected [in a prior rulemaking order]"[18] the Commission would be well justified in rejecting

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[17] Two examples here are striking. First, Verizon attempts to draw an inference of causation from a loose correlation between declines in TELRIC prices in some states during the 2000-2002 time period and an overall decline in telecommunications investment in that period. *See* Petition at 5-8. What Verizon fails to mention is that 2000 represented an unprecedented peak in stock market valuations for the macro-economy and an unprecedented peak in historic levels of telecommunications investment. *See* "Measuring the Economic Impact of the Telecommunications Act of 1996: Telecommunications Capital Expenditures (1996-2001)," p. 4, released October 3, 2002. Available at http://www.comptel.org/newsfr.html. A number of factors are undoubtedly responsible for the investment decline, including over-investment in the preceding time period, high levels of debt constraining subsequent investment, bankruptcies of competitive carriers limiting capital availability and providing distressed assets at low prices, and the overall deterioration of the domestic and global economy. In a second reckless attempt to draw a causative correlation from coincident facts, Verizon blames UNE-P at TELRIC prices for the fact that lines served by switch-based carriers are declining as UNE-P lines increase. Verizon claims this proves that UNE-P destroys efficient investment incentives. Just as likely, however, is that entry models such as UNE-L—which require greater operating leverage and rely to a greater degree on manual conversion processes—are more vulnerable to ILEC sabotage than the less capital intensive UNE-P model which allows for faster, cheaper, and more error-free customer conversions.

[18] *In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services; Implementation of Section 601(d) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone and Telecommunications Alliance*, WT Docket No. 96-162; AAD File No. 98-43, 14 FCC Rcd 11343 (¶ 16). (rel. June 30, 1999).

Verizon's Petition—which barely discusses, much less attempts to prove, the statutory requirements for forbearance under Section 10 of the Act.

IV. VERIZON FAILS TO SATISFY THE SECTION 10 REQUIREMENTS FOR FORBEARANCE.

Even if the Commission could provide Verizon some of the relief it seeks through simple forbearance from enforcing an existing rule—which it cannot—Verizon has still failed to demonstrate that it satisfies the requirements of Section 10. The Commission must deny Verizon's request for forbearance unless it can determine, for any or some proposed geographic markets, that

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[19]

As an initial matter, in the present Petition, Verizon has completely failed to identify or allege any discrete geographic market. Nor has Verizon asserted, or even attempted to explain, why its entire service territory should be considered a finite geographic market. However, assuming, *arguendo*, that the Commission could conduct a rational analysis of the other three factors required by Section 10 without reference to a geographic market, Verizon has still failed to provide any evidence which would allow the Commission to conclude that it satisfies any of these factors.

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[19] 47 U.S.C. § 160(a).

A. The Current TELRIC Rules Remain Necessary To Ensure That Charges, Practices, Classifications, or Regulations Regarding UNE Availability to Wholesale Customers Remain Just and Reasonable and Non-discriminatory.

Verizon claims it satisfies this criterion for three reasons: 1) current rates are unjust and unreasonable (to Verizon); 2) better regulatory rules for ensuring just and reasonable rates exist, such as the resale pricing standard; and 3) if the Commission mandated the resale pricing standard, then Verizon could not discriminate among competitor customers—all would receive the resale rate.[20]

Aside from simply being incorrect, Verizon's claims suffer from the same fatal flaws discussed previously. Verizon misses the point of forbearance when it claims that the TELRIC rules are not necessary to satisfy the Section 10(a)(1) standard *if* the Commission adopts the new and "better" rules proposed by Verizon. Once again, Verizon simply asks the Commission to substitute its preferred rules for the Commission's existing rules—which the Commission cannot do under the guise of forbearance.

B. The TELRIC Pricing Rules Continue To Be Necessary for the Protection of Consumers.

Verizon here asserts that TELRIC prices are not necessary for consumer protection. According to Verizon, prices that will raise its rivals' costs and reduce the profitability of low-sunk cost (*i.e.*, UNE-P-based), mass-market entry are actually *good* for consumers, because these prices will encourage high-sunk cost, facilities-based entry.[21] Verizon then cites to some anecdotal evidence of competition from "alternate delivery platforms," such as cable, which Verizon suggests would become more

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20 *See* Petition at 19-20.

21 *See id.* at 20.

prevalent as the result of higher wholesale (and ostensibly in some cases) higher retail prices.[22]

Verizon not only fails to address the immediate and certain consumer effects of a wholesale price increase, but its speculative, "armchair economics" runs contrary to economic reality. Verizon's suggestion that the Commission could promote high sunk cost entry simply by allowing Verizon to exercise its market power in the near term is inconsistent with the result the Commission would get by employing the same competitive entry analysis performed (in the merger context) by the nation's competition authorities. These authorities have concluded that entry will occur, or not, based on the prices *before* a price increase.[23]

Similarly, consideration of the likely near-term effects of Verizon's request on consumer prices and service quality do not buttress Verizon's Petition. Nationwide, CompTel estimates that residential consumers alone could save over $9 billion from widespread UNE-P-based competition at prevailing TELRIC prices.[24] Consumers also benefit from the overall price/service quality package created by the presence of UNE-P-based competitors. It is notable that, in a recent J.D. Power & Associates survey of

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[22] *See id.* at 22.

[23] "Firms considering entry that requires significant sunk costs must evaluate the profitability of the entry on the basis of long term participation in the market, because the underlying assets will be committed to the market until they are economically depreciated. Entry that is sufficient to counteract the competitive effects of concern will cause prices to fall to their pre-merger levels or lower. Thus, the profitability of such committed entry must be determined on the basis of pre-merger market prices over the long-term." DOJ-FTC 1992 Horizontal Merger Guidelines, Section 3.0. *Accord Verizon v. FCC*, 1622 S.Ct. 1646, 1668, n.20 (2002) ("a policy promoting lower lease prices for expensive facilities unlikely to be duplicated *reduces barriers to entry* . . . .")(emphasis added).

[24] Press Release and Study, released January 7, 2003. http://www.comptel.org/newsfr.html

consumers' satisfaction with their local exchange carrier, CompTel member MCI outscored Verizon in Verizon's home region in terms of overall consumer satisfaction.[25] Furthermore, CompTel member Talk America outscored all LECs nationwide, in addition to posting the highest consumer satisfaction score in the Ameritech region. Thus, Verizon cannot demonstrate, nor has it tried, that consumers would be indifferent, or better off, were the Commission to forbear from requiring states to set UNE-P prices using TELRIC.

C. Forbearance Is Not Consistent With the Public Interest and Will Not Promote Competition.

Verizon fails to even attempt to introduce any evidence that would allow the Commission to conclude that granting its Petition is consistent with the public interest, as required by the third prong of the statutory forbearance test. Rather, Verizon limps home with the same unsupported, conclusory arguments -- addressed elsewhere in these comments -- that an increase in wholesale prices will somehow stimulate greater facilities-based entry.

However, because the Commission is obliged to consider the effect on competition in its evaluation of whether the public interest standard has been satisfied,[26] CompTel wishes to draw the Commission's attention to one fact that, if introduced, would force a serious look at requests such as the one Verizon makes: the existence of a viable and vibrant *competitive* wholesale market for the UNEs in question. While Verizon blames the lack of such a market (as well as every other negative aspect of the

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[25] *See* "J.D. Powers & Associates Reports: Household Switching of Local Service Carriers Increases as New Players Enter the Local Telephone Service Market," released July 15, 2003. http://www.jdpower.com/news/releases/pressrelease.asp?ID=2003054

[26] *See* 47 U.S.C. § 160(b).

telecommunications industry) on TELRIC prices, what Verizon's Petition vividly demonstrates is that TELRIC prices themselves have created a viable wholesale market.

For example, Verizon disparages the statements of its own wholesale customers (CompTel members Z-Tel and Talk America are criticized for expressing relative satisfaction with the UNE-P wholesale offering) as being indicative of everything that is wrong with TELRIC.[27] Verizon insists on minimizing these competitors (and wholesale customers), despite the fact that these carriers have often been able to deliver a better experience to their retail customers than the incumbents. Yet, Verizon conveys a tone of moral outrage at the prospect that these wholesale customers have not committed the same sunk investment as Verizon (at the expense of captive ratepayers, of course).

On the other hand, Verizon is now America's third largest provider of long distance, yet neither Verizon, nor its wholesale supplier of long-haul service, minimizes this accomplishment. As Verizon's CFO, Doreen Toben, recently noted at a quarterly earnings briefing, "[w]hile long distance is a lower margin business, it is a great ROIC [return on investment capital] business as there is little capital investment required."[28] It is curious that Verizon seems to believe it should be able to benefit from efficient wholesale market prices for its wholesale inputs, but that its smaller competitors should not.

V. CONCLUSION

Verizon's Petition underscores the critical importance of TELRIC-based prices for wholesale telecommunications inputs used in mass-market competition. Moreover, the relief requested by the Petition cannot be granted by the Commission in this

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27 *See* Petition at 8.

28 Verizon CFO Doreen Toben, quarterly earnings briefing, July 29, 2003, quoted at http://www.voicesforchoices.org/voices/media/2Q03Highlightsfinal_1.pdf .

proceeding. Thus, the Commission should deny and dismiss Verizon's Petition in favor of considering Verizon's concerns within the context of a comprehensive public notice and comment rulemaking.

Respectfully submitted,

_____/s/_____

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